11-20-2012

State v. Hubbard Appellant's Reply Brief Dckt. 39449

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. RICHARD ANDREW HUBBARD, Defendant-Appellant.	)	NO. 39449 REPLY BRIEF

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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STATEMENT OF THE CASE

Nature of the Case

Richard Hubbard appealed against the sentence imposed on him for failure to register as a sex offender, asserting that the district court had, by its own express admission, decided to impose a harsher penalty on him because of the facts of the underlying offense (as opposed to his failure to register) and because it disapproved of the sentences imposed for that offense by the California courts that had jurisdiction over that matter. He also argued that, in adopting that mindset, the district court improperly interjected itself into that matter, over which it had no jurisdiction, rather than deciding the issue pending before it. Finally, Mr. Hubbard alleged that the district court abused its discretion, failing to redline his Presentence Investigation Report (*hereinafter,* PSI) when he challenged the information contained therein.[1]

In regard to the inappropriate sentencing issues, the State has responded, arguing in regard to the double jeopardy claim, that such assertions need first be made to the district court via I.C.R. 35(a) motions before they can be raised on appeal, even under the fundamental error doctrine. It also contends that, unless the district court expressly violates the double jeopardy clauses, then that doctrine is inapplicable. Additionally, it attempts to distinguish what the district court did in this case in regard to the California sentencing decisions from the controlling precedent.

[1] The State's contention that the order modifying the PSI should be considered sufficient in this regard is well-taken. While Mr. Hubbard would still encourage that the "better" process of actually redlining the documents should be favored, he concedes this point on appeal.

None of the State's arguments in regard to the inappropriate resentencing issue are persuasive, and this Court should afford Mr. Hubbard relief for the violation of his constitutional rights to be free from double jeopardy, as well as for the abuses of the district court's discretion.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Hubbard's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUES

1. Whether the district court violated Mr. Hubbard's right to be free from double jeopardy when it imposed a sentence in this case premised on the belief that California had been too lenient in its initial sentencing on the underlying offenses.

2. Whether the district court abused its discretion by focusing intently and almost exclusively on Mr. Hubbard's other offenses for which he had already been punished instead of the facts of the charge at issue when it imposed a sentence in the case before it.

3. Whether the district court abused its discretion by failing to redline the unreliable and erroneous statements regarding Mr. Hubbard's criminal history from the PSI.

ARGUMENT

I.

The District Court Violated Mr. Hubbard's Right To Be Free From Double Jeopardy When It Imposed A Sentence In This Case Premised On The Belief That California Had Been Too Lenient In Its Initial Sentencing On The Underlying Offenses

A. Introduction

Based on the district court's clear assertions, it inappropriately focused its analysis on Mr. Hubbard's other, already-sentenced offense, indicating its intention to resentence Mr. Hubbard for those already-punished actions. Idaho precedent on point, apparently ignored by the State, holds that, in the face of such inappropriate considerations, the defendant may raise a double jeopardy claim for the first time on direct appeal. Furthermore, the remedy for that error is actually unavailable through Rule 35, as promoted by the State, as it would require the district court to add facts to the record, actions beyond the scope of its authority in illegal sentence review. As such, this Court is not only authorized to consider the merits of Mr. Hubbard's double jeopardy claim, but it is actually the proper body to make such a review. Because the district court's actions in this case constitute fundamental error, this Court should vacate Mr. Hubbard's sentence and either impose an appropriate sentence or remand his case for new sentencing.

B. The State Ignores Contrary Precedent When It Asserts That Double Jeopardy Claims Must Be Made To The District Court Pursuant To I.C.R. 35

Idaho law has already established that double jeopardy claims may be raised for the first time on appeal pursuant to the fundamental error doctrine. *See, e.g.,*

State v. Ayala, 129 Idaho 911, 919 (Ct. App. 1996); *State v. Swader*, 137 Idaho 733, 736 (Ct. App. 2002).[2] In *Ayala*, the Court of Appeals declared:

> Ayala asserts that he suffered a violation of his constitutional and statutory double jeopardy protections. He acknowledges that the double jeopardy issues were not raised below, allegedly due to his trial counsel's ineffectiveness; however, he claims that the issues are nevertheless reviewable on appeal because they constitute fundamental error.
>
> > *Review of these claims would be proper upon a determination of fundamental error . . . .*

Ayala, 129 Idaho at 919 (quoting *Standards of Appellate Review in State and Federal Courts,* IDAHO APPELLATE HANDBOOK § 4.5.1 (Idaho Law Foundation, Inc. 1996)) (emphasis added); *see also Swader*, 137 Idaho at 736 ("In *Ayala*, this Court addressed Ayala's double jeopardy claims on appeal, even though his attorneys had failed to raise them below. Accordingly, we will consider Swader's double jeopardy claims."); *see also State v. Jensen*, 138 Idaho 941, 944, 944 n.2 (Ct. App. 2003) (recognizing that there are

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[2] While there have been decisions to the contrary, *see, e.g. State v. Lee*, 2005 Unpublished Opinion No. 534 (Ct. App. 2005), they are unpublished, and therefore, carry no precedential weight. *See, e.g.,* Supreme Court Operating Rules Rule 15(f) ("If an opinion is not published, it may not be cited as authority or precedent in any court.") Additionally, none of the cases the State cites (Resp. Br., pp.3-4) actually hold contrary to *Ayala* and *Swader*. *See State v. Alsanea*, 138 Idaho 733, 745 (Ct. App. 2003) (holding only that Rule 35 allows for corrections of illegal sentences, but not applying that rule in the double jeopardy context); *State v. Lavy*, 121 Idaho 842, 845 (1992) (holding that challenges to illegal sentences may not be reviewed for the first time on appeal, but not extending that rule to claims of double jeopardy violations); *State v. Martin*, 119 Idaho 577, 578-79 (1990) (same); *State v. Dorsey*, 126 Idaho 659, 661-62 (Ct. App. 1995) (same); *State v. Hernandez*, 122 Idaho 227, 229 (Ct. App. 1992) (same); *State v. Pratt*, 125 Idaho 546, 553, 560 (1993) (recognizing that the defendant had contested the issue of double jeopardy in a Rule 35 challenge to the legality of the sentence, but not mentioning, much less requiring, that to be the only available procedure); *State v. Jensen*, 138 Idaho 941, 944 (Ct. App. 2003) (recognizing a Rule 35 challenge to the legality of the sentence as one of several available alternatives by which the defendant might assert a double jeopardy violation, another being a timely notice of appeal). Therefore, this Court should look to the uncontradicted precedent directly on point–*Ayala* and *Swader*–to resolve Mr. Hubbard's case.

multiple avenues by which a defendant might choose to raise a double jeopardy challenge, specifically, through a timely appeal from the judgment of conviction, through "a motion under I.C.R. 35 to correct an illegal sentence *or* by an application for post-conviction relief") (emphasis added).[3]

As a result, precedent holds that double jeopardy claims are properly raised pursuant to the fundamental error doctrine when not argued below: "We conclude, ***following review***, that Ayala's claims reveal no error and, for the reasons stated below, provide no grounds for overturning his conviction." *Ayala*, 129 Idaho at 919 (emphasis added); *Swader*, 137 Idaho at 736. Additionally, "When, on appeal, we discover the existence of an illegal sentence, we cannot allow such a sentence to stand uncorrected. Consequently, and in the interest of efficient judicial administration," the Court of Appeals ordered a remedy for that error, even though it might have otherwise been alleged as illegal pursuant to I.C.R. 35. *King v. State*, 114 Idaho 442, 447 (Ct. App. 1988) (citations omitted). Therefore, Mr. Hubbard's claims are viable on appeal if they meet the definition of fundamental error.

And, as the State correctly recognizes, *State v. Perry*, 150 Idaho 209 (2008), only clarified the standard applied when invoking the fundamental error doctrine; it did not re-define the overarching doctrine. *See Perry*, 150 Idaho at 219-20. Therefore, *Ayala* and *Swedar* still govern this question: assertions that a sentence violates the protections against double jeopardy may be raised pursuant to fundamental error (*i.e.*, subject to

[3] As the *Jensen* Court indicated by its use of the term "or," these are alternative procedures, and thus, the defendant has the prerogative to choose the means by which he makes his claim. *See, e.g., Markel Intern. Ins. Co., Ltd. v. Erekson*, 153 Idaho 107, 110 (2012) (the term "or" indicates that the actor has a choice between alternative courses); *State v. Rivera*, 131 Idaho 8, 10 (Ct. App. 1998) (same).

Perry analysis) without first presenting the error to the district court, either by objecting or by pursuing Rule 35 relief. *Ayala*, 129 Idaho at 919; *Swader*, 137 Idaho at 736; *Jensen*, 138 Idaho 941, 944, 944 n.2. As such, the State's argument to the contrary, which ignores this clear precedent, should be rejected.

C. I.C.R. 35 Is An Improper And Unavailing Mechanism Through Which To Argue A Double Jeopardy Violation Because A Claim Of Double Jeopardy Requires Consideration Of Facts Not In The Record And Idaho Supreme Court Precedent Limits The Scope Of I.C.R. 35 Challenges Of Illegal Sentence To Only The Facts In The Record

The State contends that, when there is a violation of the constitutional protections against double jeopardy, the defendant must first file a motion pursuant to Rule 35. That is incorrect for several reasons.

First, such a procedural requirement is unnecessary, as the determination of whether a defendant's rights to be free of double jeopardy have been violated is a question of law, subject to free, or *de novo*, review by the appellate courts. *State v. Bush*, 131 Idaho 22, 33 (1997). That means it is purely a question of law and no further factual development is required. Just as the appellate court needs no further input from the district court when determining whether a person was in custody for purposes of *Miranda*,[4] no further input from the district court is necessary to determine whether a defendant is being punished again for actions which were already subjected to punishment. That is a question to be considered independently by the appellate court, without needing any additional input from the district court. As such, it is a

[4] *See, e.g., State v. Frank*, 133 Idaho 364, 369 (Ct. App. 1999) (explaining that, when assessing a claim pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), the appellate court defers to the findings of fact already in the record, but independently determines whether a constitutional violation has occurred).

question properly posited on direct appeal. *See, e.g., Ayala*, 129 Idaho at 919; *Swader*, 137 Idaho at 736.

Even if further factual development were required, Rule 35 does not provide a remedy in that regard. The Idaho Supreme Court has clarified that challenges to the legality of a sentence pursuant to I.C.R. 35 are limited to reviews for illegality on the face of the existing record. *State v. Clements*, 148 Idaho 82, 85-87 (2009). That Court held that "the interpretation of 'illegal sentence' under Rule 35 is limited to sentences that are illegal from the face of the record, *i.e.*, those sentences that do not involve significant questions of fact nor an evidentiary hearing to determine their illegality." *Id.* at 87. However, under the State's proposed rule, the district court's two choices when a Rule 35 motion alleges an illegal sentence based on a double jeopardy violation would be: (1) admit to violating the constitutional protections against double jeopardy, or (2) go beyond the scope of its authority pursuant to I.C.R. 35 by going beyond the face of the record and articulating rationales to try and justify the sentence imposed.

And, as the second alternative seems the more likely result, such a requirement as the State proffers would eviscerate the protections against double jeopardy, because the district court would be unable to offer a remedy for the error because of the *Clements* rule. "The Double Jeopardy Clause is not such a fragile guarantee that [the State] can avoid its limitations" because of technicalities or gaming of the system. *Brown v. Ohio*, 432 U.S. 161, 169 (1977) (condemning the State's attempts to sidestep the Double Jeopardy Clause by artificially dividing a course of actions into component events so as to punish the defendant twice for the same course of conduct). Therefore,

Rule 35 provides in ineffective and inappropriate vehicle to make such findings, and thus, the State's argument in this regard should be rejected.

Furthermore, the State's proposed requirement would create a situation where the defendant's federal and state constitutional rights would be dependent on a procedural rule. That argument runs contrary to one of the basic tenets of the legal system, specifically, that the Constitution, particularly the federal Constitution, is the supreme law of the land, and will therefore, always be the governing law. "Because the United States Constitution *always* trumps state law, compliance with a statute *or rule* does not shield [the State] when a [constitutional right] is infringed. *Matthews v. Jones*, 147 Idaho 224, 231 (Ct. App. 2009). Therefore, even were such a rule as the State promotes to exist, the State cannot use that as a shield against the clear and obvious violation of Mr. Hubbard's double jeopardy rights. *See id.*; *King*, 114 Idaho at 447 (appellate courts cannot allow illegal sentences discovered on appeal to stand uncorrected, even if I.C.R. 35 would otherwise allow for a remedy). As such, it remains appropriate for double jeopardy claims to be raised on appeal, as opposed to claims pursuant to I.C.R. 35. *See Ayala*, 129 Idaho at 919; *Swader*, 137 Idaho at 736.

Therefore, for any or all of the foregoing reasons, the State's argument that a defendant must first present his claim of a double jeopardy violation via an I.C.R. 35 motion, is incorrect, is contrary to established law, and should be rejected.

D. The District Court's Violation Of The Protection Against Double Jeopardy Constitutes Fundamental Error And May Be Raised For The First Time On Appeal

As set forth in the Appellant's Brief, the district court's decision to again punish Mr. Hubbard for actions which had already been subjected to punishment by the

California court constituted fundamental error, clearly violating his rights to be free from double jeopardy.

1. The District Court's Actions Violated Mr. Hubbard's Unwaived Constitutional Right To Be Free From Double Jeopardy

Regardless of whether the violation of Mr. Hubbard's constitutional rights is express or implied, it is still a violation of the double jeopardy protections, which must be remedied. The State's arguments to the contrary are unpersuasive. (*See* Resp. Br., p.7 (contending that just because the violation is not expressed, the right is not violated).) First, the violation need not be express.[5] *See, e.g., State v. Howard*, 150 Idaho 471, 480-81 (2010) (holding that, even though the findings were the result of legal error, the subsequently-entered judgment of acquittal triggered double jeopardy protections, barring a retrial which had not even occurred)[6]; *see also State v. Bryant*, 127 Idaho 24, 28-29 (Ct. App. 1995) (finding a violation of double jeopardy protections even thought the issue was not raised before the district court, by either a pre- or post-trial motion or at the trial itself). Because the State's argument is contrary to precedent, it should be rejected.

[5] As will be demonstrated *infra*, Mr. Hubbard does not concede that the error is only implied. The district court's expressed comments make it clear the district court was punishing already-punished conduct.

[6] In that case, because the Idaho Supreme Court invoked the protections prospectively, there could not have ever been an expression of intent to violate the double jeopardy provisions, as the State's position would require. *See Howard*, 150 Idaho at 474-75. Nevertheless, the Idaho Supreme Court held that the double jeopardy protections extended in that case. *Id.* at 480-81. Therefore, the State's argument, that an expressed intent to violate those protections is necessary to allow those protections to apply in a given case, cannot be an accurate representation of the law in Idaho, and therefore, must be rejected.

Second, taken to its logical conclusion, the State's position in this regard would require the district court to admit on the record, "even though the defendant was already punished for this crime once, I am going to do so again." Such a prerequisite deprives both the federal and state constitutional double jeopardy provisions of all their protections because if a district court judge was cognizant of this error, presumably, it would not commit it. Alternatively, if the district court was conscious of the error and intended to proceed with a knowing violation of the defendant's constitutional rights, it would not be so foolish as to make a record of that intent.

Ultimately, "[t]he Double Jeopardy Clause is not such a fragile guarantee that [the State] can avoid its limitations" by making such technical distinctions. *Brown*, 432 U.S. at 169. There is no technical requirement that the district court admit its intent to violate the double jeopardy protections for those protections to apply. Therefore, even if the punishment is only impliedly for the same conduct, it is still a violation of Mr. Hubbard's constitutional rights, and as such, deserves a remedy from this Court.

2. The Violation Of Mr. Hubbard's Double Jeopardy Rights Is Clear From The Record

The district court's statements clearly reveal the double jeopardy violation – the district court's expressed focus on the offense which occurred in California and its displeasure with the California court's sentencing decision, which led to it essentially resentencing Mr. Hubbard on that matter, rather than the offense pending before it. For example, the district court stated, "I don't feel comfortable trusting California to not allow you out again." (Tr., p.32, Ls.4-6.) Elsewhere, the district court stated, "the [Idaho] taxpayer would just as soon pay the cost to make sure you're locked up *and not trust*

California to do what it's supposed to do." (Tr., p.30, Ls.21-24 (emphasis added).) In that same vein, the district court observed, "You have four L&L's, you pled to two, *and they put you on five years probation.*" (Tr., p.30, L.25 - p.31, L.1 (emphasis added).) To that point, the district court tellingly attested, "You blame the victim in this case."[7] (Tr., p.33, Ls.18-19.) Furthermore, the district court noted "there was a second person who came in and made allegations, whether [Mr. Hubbard] was actually convicted or not." (Tr., p.33, Ls.20-22.) These sort of comments permeate the district court's statements at sentencing, demonstrating its clear violation of Mr. Hubbard's constitutional rights. (*See generally* Tr., pp.30-34.)

These statements all reveal that the district court was impermissibly focused on those other facts, rather than the case pending before it. *Compare State v. Findeisen*, 133 Idaho 228, 229-30 (Ct. App. 1999). That improper focus is particularly troubling in cases like this, where the other conduct has already been subjected to judgment and punishment in another court. *Compare id.* In fact, the district court here acknowledged that Mr. Hubbard had already been sentenced for that prior conduct. (*See, e.g.*, Tr., p.30, L.25 - p.31, L.1.) The violation, as it was in *Findeisen*, is clear in the record.

Additionally, contrary to the State's assertion, the fact that the district court did not exclusively focus on the previously-punished actions does not mean that its actions were somehow proper, or that the violation of Mr. Hubbard's rights was not clear. *See Findeisen*, 133 Idaho at 229-30 (finding that the district court improperly focused on

[7] As pointed out in the Appellant's Brief and unrefuted in the Respondent's Brief, the only victim to whom the district court could be referring is the victim of the California case. (App. Br., pp.11-12; *see generally* Resp. Br.) As such, when it says "in this case" the district court could only be referring to the underlying case, not the failure to register case pending before it.

behavior punished in another court, but in quoting the district court's comments, revealing that the district court did not exclusively focus on that other behavior). Just because the district court made certain, proper findings does not necessarily mean that its overall decision was somehow also proper. Furthermore, it is clear from the district court's statements that it was intensely focused on the punishment the California court had imposed: "You have four L&L's, you pled to two, and they put you on five years probation. . . . I don't feel comfortable trusting California to not allow you out again." (Tr., p.30, L.25 - p.31, L.1; Tr., p.32, Ls.4-6.) This comment, and others like it, also demonstrates that the district court was not merely considering Mr. Hubbard's prior criminal history, as the State suggests. (*See* Resp. Br., pp.8-10.) The district court, like the district court in *Findeisen*, went well beyond considering a prior criminal history and clearly imposed a sentence based on its consideration of the facts underlying the offenses in that prior history. That error, clear in the record, satisfies the second prong of the *Perry* analysis.

3. The Error Affected The Outcome Of The Trial Proceedings By Resulting In A Harsher Sentence

As the State did not offer any argument on this point (*see generally* Resp. Br.), Mr. Hubbard simply refers this Court back to his Appellant's Brief at page 13. As all three prongs to the *Perry* analysis are met, the district court's clear violation of Mr. Hubbard's constitutional rights to be free from double jeopardy should be remedied by this Court.

II.

The District Court Abused Its Discretion By Focusing Intently And Almost Exclusively On Mr. Hubbard's Other Offenses For Which He Had Already Been Punished Instead Of The Facts Of The Charge At Issue When It Imposed A Sentence In The Case Before It

A. Introduction

The rule from *Findeisen*, which governs this analysis, does not require the district court to focus exclusively on some other act in order for the district court to abuse its discretion in this way. Rather, the consideration of the other offense need only be intense and almost exclusive. The State reads the *Findeisen* rule too narrowly. The district court in this case did almost exactly the same thing the district court did in *Findeisen*: it departed from consideration of the acts material to the offense for which it was imposing sentence and focused its consideration on another set of facts that, while related to the issue pending, had already been addressed and punished by another district court. In that scenario, present both in *Findeisen* and in the case now on appeal, the district court is not permitted to substitute its own judgment for that of another district court when it is dissatisfied with the sentence imposed by that other court. Doing so constitutes at least an abuse of the district court's discretion and should be remedied by this Court.

B. The District Court's Intense And Almost Exclusive Focus On The Facts Of An Already-Adjudicated Case, Rather Than The Facts Of The Case Pending Before It, Was Improper And Led It To Impose An Excessive Sentence In An Abuse Of Its Discretion

The district court in this case focused its discussion at sentencing on the facts of the underlying lewd and lascivious conduct case, including the sentencing decisions, arising in California. In addition to all of the district court's comments quoted *supra*,

there are others demonstrating the impermissibly intent focus on improper facts, which constitute the abuse of discretion. For example:

> I sort of heard a theme there that, you know, it's the meth, it's the marijuana . . . no one in my drug court while under the influence of any of those drugs *goes out and molests young girls. Your drugs have nothing to do with it* [the molest behavior]. That was a decision you made. . . .

(Tr., p.29, L.22 - p.30, L.3 (emphasis added).) At another point:

> I'm not going to go through all of the--everything that's in this presentence report. But it is really clear that the prosecutor has nailed it.[8] *You blame the victim in this case*, and according to her statements, *that abuse started when she was six years old.*. And there was a second person who came and made allegations, whether he was convicted or not.

(Tr., p.33, Ls.15-24 (emphasis added).) This sort of conduct by a district court is exactly what the Court of Appeals condemned in *Findeisen*:

> This is reflected in the following comments made by the court at the sentencing hearing:
>
> > I find this to be one of the more appalling offenses that I have seen in over 15 years of being a judge. A shoplifting burglary is basically a fairly low-level offense, where even when somebody's a persistent violator, the court is not inclined, as a general rule, to treat that offense as approaching the gravity of many other kinds of offenses.
> >
> > It was a relatively minor offense. It would have resulted in a relatively short, or at least not major sentence, because a shoplifting burglary generally does not warrant the most severe penalties.
> >
> > But I find this case to be so appalling. Two attacks on the key witness in this case is just appalling. It indicates somebody who's not only dedicated to committing crimes against the public, but whose criminal activity is accelerated.
> >
> > I find that a concept of treating this as a mistake that an apology can address to be somewhat appalling. The victim has suffered something that is just incomprehensible. It's clearly a

[8] The prosecutorial comments to which the district court referred consisted of a quote from a letter Mr. Hubbard wrote to the victim's mother in which he discussed his views of the lewd and lascivious conduct offense, and which the record indicates was written at that time his original case was pending (which was some ten years prior in California). (*See* Tr., p.22, L.17 - p.24, L.13; *see* PSI, pp.124-32.)

> grievous wrong, and the system itself is obligated to protect witnesses and to punish to the utmost anyone who would harm a witness in a case before a court.
>
> The defendant tried to silence the key witness in this case. I think that's the most aggravating factor a person could possibly have. I'm imposing the maximum sentence allowed to me under the statute of ten years fixed, to be consecutive, because I think the defendant warrants the maximum. I think there is-if there is ever a case that did, this defendant deserves it.

Findeisen, 133 Idaho at 229-30. Just as in this case, the district court in *Findeisen* was discussing, at length, the treatment of the victim "in this case," discussing the nature of other conduct for which the defendant was not appearing, and so on, despite the fact that none of those actions were within that district court's sentencing authority. *Id.*

The only difference, and it is not a significant difference, between Mr. Hubbard's case and *Findeisen* was the district court's perspective on the seriousness of the offense it actually was supposed to focus on. In *Findeisen*, the pending offense was "relatively minor." *Id.* Conversely, in Mr. Hubbard's case, the pending offense was "significant." (Tr, p.32, Ls.16-17.) However, contrary to the State's assertion (*see* Resp. Br., p.12), that was not the shortcoming the *Findeisen* Court was addressing:

> Perhaps the intensity of the trial court's focus on the other offenses would be appropriate *if they were acts for which the defendant was not otherwise being punished*. . . . we fully empathize with [the district court's] repulsion at such behavior. However, the justice system entrusted imposition of punishment for that conduct to [another judge].

Findeisen, 133 Idaho at 230 (emphasis added). Regardless, "it is not a permissible remedy for that dissatisfaction to sentence [the defendant] again for those same offenses." *Id.* The Court of Appeals clearly was not concerned on how severe the district court thought the crime before it was, as it did not mention the district court's characterization of burglary as "relatively minor." *See id.* Rather, it was concerned with

the district court's intense focus on facts and actions that were previously subjected to punishment and which were irrelevant to the offense pending before that court. *See id.*

The same issue that arose in *Findeisen* is present in this case. Both district courts disregarded or downplayed the facts relating to the offense they had jurisdiction to consider, and instead, intensely focused their analysis on facts that, while related to a degree to the offense at bar, were actually irrelevant to the pending offense. And while not unjustifiably displeased, both district courts exceeded the scope of their discretion by imposing sentences that were intended to rectify perceived shortcomings in the sentences imposed by other judges. The Court of Appeals has declared that such behavior by a district court at sentencing constitutes an abuse of discretion. Therefore, because the district court in this case engaged in such inappropriate behavior, Mr. Hubbard's sentence should be vacated and his case remanded for new sentencing.

III.

The District Court Abused Its Discretion By Failing To Redline The Unreliable And Erroneous Statements Regarding Mr. Hubbard's Criminal History From The PSI

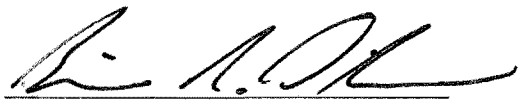
The State correctly points out that a Sealed Order correcting the PSI was entered and appended to the back of the PSI packet. (Resp. Br., pp.15-16.) Although Mr. Hubbard would still maintain that district courts should engage in "the *better procedure*" of redlining the PSI itself to ensure the record is clear in all its statements, *State v. Rodriguez*, 132 Idaho 261, 262 n.1 (Ct. App. 1998), he concedes that the district court's order in this case may be reasonably seen as "striking" the erroneous

information, which is the ultimate goal in these circumstances. *See State v. Molen*, 148 Idaho 950, 961-62 (Ct. App. 2010). Therefore, Mr. Hubbard concedes this issue.

CONCLUSION

Mr. Hubbard respectfully requests that this Court vacate his sentence and remand his case for a new sentencing hearing. Alternatively, he respectfully requests that this Court reduce his sentence as it deems appropriate.

DATED this 20th day of November, 2012.



BRIAN R. DICKSON
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 20th day of November, 2012, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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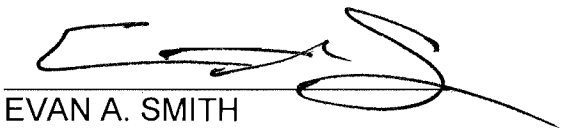

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